

# United States Senate

WASHINGTON, DC 20510

September 12, 2014

The Honorable Gregory Friedman  
Inspector General  
Department of Energy  
1000 Independence Avenue, SW  
Washington, D.C. 20585

Dear Inspector General Friedman:

We write to ask you to determine facts related to allegations surrounding the Federal Energy Regulatory Commission's (FERC) enforcement program with respect to fairness and transparency. We note that Senator Casey has already sent a letter seeking answers about FERC's enforcement program, and we submit additional questions for your consideration.

Our letter is prompted by information recently placed in the public record about aspects of FERC's enforcement work in recent years. We support enforcement of all federal laws, including those that are intended to protect participants in the vital energy markets regulated by FERC. However, questions and allegations have been raised about the fairness and transparency of FERC's enforcement program following a Senate Energy and Natural Resources Committee hearing<sup>1</sup> and the publication of an *Energy Law Journal* article.<sup>2</sup>

FERC's decisions have significant impacts. By one rough measure of economic impact, the energy transmitted over FERC-regulated pipes and wires is worth over \$400 billion per year or about three percent of the gross domestic product. Most Americans, including our constituents, feel the impact of FERC's decisions. Ultimately at stake are the quality of energy service and billions of dollars that are paid by energy consumers. Although Congress has jurisdiction over the laws that FERC administers, and FERC itself is organized as an independent multi-member commission, the FERC Chairman and staff have considerable authority on their own.

Given your office's expertise in investigating allegations of abuse, we ask you to inquire into the underlying facts as illuminated by the record of the hearing and advise Congress and the public as soon as possible on the following points:

1. There are allegations that the public, including FERC-regulated entities and their employees, are not being given actionable notice by FERC of the conduct, which under current law, FERC precedent, and applicable tariffs constitutes market manipulation. It has been further suggested that certain parties who do not otherwise appear frequently before FERC are held to different standards. The record of the referenced hearing, the *Energy Law Journal* article, and the attached materials<sup>3</sup> contain a number of factual

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<sup>1</sup> See, e.g., Testimony of Norman Bay before Committee on Energy & Natural Resources, United States Senate (May 20, 2014); #1-4 from Sen Lee (pp. 33-40), #1-3 from Sen Barrasso (pp. 40-45), #3-6, 11, 43, 45 from Sen Murkowski (pp. 49-54, 62-66, 100-106);

[http://www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=198f6249-394c-482d-9c7e-0d0ec80692](http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=198f6249-394c-482d-9c7e-0d0ec80692)

<sup>2</sup> Scherman, William S., Brandon C. Johnson, and Jason J. Fleischer. "The FERC Enforcement Process: Time For Structural Due Process and Substantive Reforms". *Energy Law Journal* 35.1 (2014): 101-49. Print.

[http://www.felj.org/sites/default/files/docs/elj351/18-101-Scherman%20et%20al\\_Final%205.13.14.pdf](http://www.felj.org/sites/default/files/docs/elj351/18-101-Scherman%20et%20al_Final%205.13.14.pdf)

<sup>3</sup> See Attachment A.

assertions and counterpoints on these claims. For example, the record contains conflicting assertions: on the one hand, it suggests that there is adequate notice, but on the other hand it suggests that market participants have no way to know the conduct that is proscribed. Is there a lack of actionable notice with regard to market manipulation? Is FERC holding certain parties to different standards with regard to market manipulation?

2. There are allegations that the targets of FERC investigations and their employees are not afforded an opportunity to:
  - a. Defend themselves and communicate directly with FERC Commissioners before proceedings become public;
  - b. Shield their identities from disclosure and thus protect their reputations until proceedings against them have progressed to an appropriate stage (*e.g.*, until they have been formally “charged”);
  - c. Gain timely access to exculpatory materials known to the government;
  - d. Obtain prompt access to the transcripts of their depositions;
  - e. Secure *de novo* Federal Court review of FERC enforcement action that is consistent with the Federal Power Act and FERC precedent; and
  - f. Receive penalties (if and when penalties are warranted) that are proportionate to the civil infraction at issue and their relative role in energy markets.

With respect to each of the foregoing, have the targets of FERC investigations and their employees been afforded the process required by FERC's own regulations and precedents? To what extent have the targets of FERC investigations and their employees been afforded the level of process provided under law by other federal enforcement agencies, such as the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the Department of Justice?

3. During his confirmation hearing, the former Director of the Office of Enforcement was asked about the connection between FERC's enforcement settlement with Constellation Energy and its approval of Constellation's merger with Exelon. FERC approved the settlement agreement with Constellation on the same day as it approved the Exelon-Constellation merger. The settlement agreement (FERC Docket No. IN12-7-000)—which the Director signed—directly references<sup>4</sup> the merger with Exelon. When the Director was asked whether he would be concerned about the appearance of a quid pro quo between merger reviews and enforcement, the Director said he “would be concerned about the appearance of a quid pro quo...between merger reviews and enforcement.”<sup>5</sup> When asked whether he or anyone else at FERC suggested to the parties of the pending merger that it would be prudent to settle the pending enforcement action, he testified that “[t]o the best of my recollection, I did not indicate to the parties in the Exelon-Constellation merger that it would be prudent to settle the pending enforcement matter to get the merger approved. I do not know whether anyone else at FERC did so.”<sup>6</sup> At the time, the settlement agreement with Constellation was the largest settlement in FERC's history and the Exelon-Constellation merger created one of the nation's largest electric utilities.

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<sup>4</sup> See Attachment B (paragraph #44).

<sup>5</sup> Testimony of Mr. Norman Bay (Answers for the Record ) before the Committee on Energy and Natural Resources, United States Senate (May 20, 2014); Question for the Record #5 from Sen. Lisa Murkowski (pg. 51); [http://www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=198f6249-394c-482d-9c7e-0d0ec80692cf](http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=198f6249-394c-482d-9c7e-0d0ec80692cf)

<sup>6</sup> Ibid.

Given these circumstances, did the former FERC Chairman or any member of FERC's staff suggest or actively or effectively require that a regulatory approval would be contingent upon the "voluntary" settlement of an enforcement dispute, *e.g.*, in the matter of Constellation Energy? If so, does such a practice represent any conflict of interest or wrongdoing?<sup>7</sup>

4. The attached document from the Office of Personnel Management denies the request to reclassify the position of FERC's Director of the Office of Enforcement within the Senior Executive Service as a career position and then to install the non-career incumbent in the career position.<sup>8</sup> Given that this was rebuffed by the Office of Personnel Management and deemed impermissible under federal law and regulation, we ask that you investigate the circumstances surrounding the request for such a reclassification.

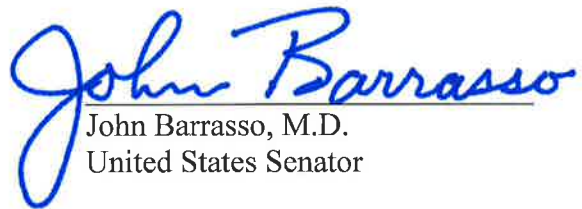
It is important to establish facts that can be the basis of good decision making by Congress. We look forward to your prompt response.

Sincerely,



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Susan M. Collins  
United States Senator



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John Barrasso, M.D.  
United States Senator

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<sup>7</sup> See Attachment C.

<sup>8</sup> See Attachment D.